Casebase Number: G0127

Title of Payment: Domiciliary Care Allowance

Community Law and Mediation Northside
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision**: 4 July 2022**

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Keywords: Domiciliary Care Allowance; Social Welfare Payment; Discrimination; Irish Constitution; European Convention on Human Rights.

Organisation who represented the Claimant: N/A

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Case Summary:

The case is that of *Donnelly & Anor v Minister for Social Protection & Ors* [2022] IESC 31.
This case concerned a challenge to legislation that excluded the first named appellant ("Mr. Donnelly") from eligibility for a social welfare payment in respect of his severely disabled son, Henry, the second named appellant during a prolonged period when Henry was in hospital. The challenge was brought, under Article 40.1 of the Constitution and Article 14 of the European Convention on Human Rights, to a decision of the Minister of Social Protection and to certain provisions of the Social Welfare Consolidation Act 2005. The appellants argued that they have been unlawfully discriminated against as compared to families who are in a similar position but caring for a severely disabled child at home. The payment in question is the Domiciliary Care Allowance ("**DCA**").

Henry was born with Down syndrome in June 2015 and has suffered with multiple other serious medical conditions. As a result, he was hospitalised for all the time from his birth until November 2017. During the time he was in hospital, Mr. Donnelly gave up his employment. It is apparent from the evidence that the level of care provided to Henry by his parents during this time, while undoubtedly onerous, was to an extent expected by the hospital. Mr. Donnelly applied for the DCA in July 2016 and his application was refused. He sought an internal departmental review of the decision which came to the same conclusion. Henry was discharged home in late 2017 and Mr. Donnelly has been in receipt of the payment since.

Relief was refused in the High Court ([2018] IEHC 421). The Court of Appeal ([2021] IECA 155) affirmed the decision of the High Court. The appellants were granted leave to appeal to the Supreme Court by determination of the 29th July 2021 ([2021] IESCDET 89).

Key Conclusions: The Supreme Court concluded that the appellants had failed to discharge the burden of proving that the measure in question was either invalid having regard to the Constitution or incompatible with the Convention.

Relevant Legislation:

Social Welfare Consolidation Act 2005:

Sections:

186B.— In this Chapter—

'institution', means a hospital, convalescent home or home for children suffering from physical or mental disability or ancillary accommodation and any other similar establishment providing residence, maintenance or care where the cost of the child's maintenance in that institution is being met in whole or in part by or on behalf of the Executive or the Department of Education and Science;

'international organisation' means an international intergovernmental organisation, including, in particular and without limiting the generality of the foregoing—

(a) the United Nations Organization and its specialist agencies,

(b) the institutions and agencies of the European Communities,

(c) the Council of Europe, and

(d) the Organisation for Economic Co-operation and Development;

'qualified child' has the meaning given by section 186C;

'qualified person' has the meaning given by section 186D.

186C.— A person who is under the age of 16 years (in this section referred to as 'the child') is a qualified child for the purposes of payment of domiciliary care allowance if—

(a) a medical practitioner has certified, in such manner as is prescribed, that—

(i) the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age, and

(ii) the disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months,

(b) the child—

(i) is ordinarily resident in the State, or

(ii) satisfies the requirements of section 219(2),

and

(c) the child is not detained in a children detention school as defined in section 3 of the Children Act 2001 .

186E.— (1) Subject to subsections (2) and (3), domiciliary care allowance is not payable for any period during which a child is resident in an institution.

186D.— (1) A person is a qualified person for the purpose of receiving domiciliary care allowance in respect of a qualified child if—

(a) the child normally resides with that person,

(b) that person provides for the care of the child, and

(c) at the date of the making of the application for domiciliary care allowance—

(i) that person is habitually resident in the State, or

(ii) the requirements of section 219(2) are satisfied in relation to that person.

(2) For the purposes of subsection (1)(a) the Minister may by regulation make rules for determining with whom a qualified child is to be regarded as normally residing.

Key Arguments:

The applicant argued:

1. **Challenge grounded upon Article 40.1**
   The appellant's challenge is based on the constitutional guarantee, enshrined in Article 40.1. The appellants make the submission that even if the approach established in the cases of *MhicMhathuna* and *Lowth*, as analysed by the Court of Appeal, are relied upon, the respondents have not identified grounds for distinguishing between a claimant and a comparator that would "justify" the difference in treatment. They emphasise that the two sentences in Article 40.1 must be read conjunctively rather than disjunctively. The appellants therefore submit that a legislative differentiation, claimed to be based on a legitimate objective, must be analysed by reference to the qualifications in the second sentence. Here, it is argued that the parents of severely disabled children fulfil the same social function – that of providing care substantially in excess of that required by other children – in the hospital as in the home.

2. **The Comparator**
   As established in the Court of Appeal, social function is seen as a significant aspect of the analysis. It was submitted that if no difference in social function is identified, the discrimination is presumed illegitimate. The appellants identify the relevant social function as that of providing daily repetitive and essential care to a sick child, and say that Mr. Donnelly performed that function to the same extent as it would be carried out in the home. The appropriate comparator is therefore a parent of a severely disabled child who is providing constant care and supervision in the home and not in the hospital. It is contended that Mr. Donnelly has been excluded, although he carried out an identical social function, because he did so in a different venue.

3. **Burden of Proof**
   The appellants submitted that they had adduced sufficient evidence to shift the onus onto the State. The appellants argued that the Court of Appeal went too far in requiring them to prove the effect of the exclusion on an entire category rather than themselves. It was contended that to require the appellants to show that "all, many or most parents whose children are hospitalised in these circumstances do, can or must provide the same care as [Mr. Donnelly] and his wife did" would place an

insurmountable burden on them. The appellants are privy only to their own circumstances, and no applicant would be able to afford the expense involved if what is required is a commissioned professional survey proving the effect on all or most of the others in the class.

4. **ECHR**
   The appellants relied upon the jurisprudence of the ECtHR for the proposition that, while there is no obligation on States to provide any particular social welfare payment (because there is no Convention right to acquire property), payments that are in fact provided generate a proprietary interest and must be administered on a non-discriminatory basis. They relied on the cases of *Stec v United Kingdom* (2006) 43 EHRR 1017 and *Carson v United Kingdom* (2010) 51 EHRR 13.

The respondent argued:

1. **Challenge grounded upon Article 40.1**
   The respondents argued that in order for the Court to accede to the argument that the legislature cannot provide only for the children cared for in the home would be an impermissible intrusion into the freedom of the Oireachtas to make policy choices about the qualifying criteria of welfare schemes.

2. **The Comparator**
   The respondents argued that the appellant's analysis of the social function of Mr. Donnelly in this regard is too narrow and ignores the significant distinction between his situation and that of parents caring for their child at home. It is wrong to submit that the only difference is the venue in which care is provided, as there is significant difference in how the care is provided, how it is funded and who provides it.

2. **Burden of proof**
   The respondents supported the findings of the Court of Appeal regarding the burden of proof. They claimed that there was no evidence before the court demonstrating that Mr. Donnelly was treated different to like-positioned persons. Although there was evidence of the care he was provided in hospital, there was none provided in relation to the care given at home. There was also no evidence of the comparative position as regards the care generally provided in homes or the relative costs.

3. **ECHR**
   The respondents accepted that, while States are not obliged to provide any particular social welfare payments, any scheme of payment actually adopted must be administered in a non-discriminatory fashion. However, it is noted that in *Stec v. United Kingdom*, the ECtHR said that Article 14 did not prohibit a State from treating groups differently in order to correct "factual inequalities" between them.

The Irish Human Rights and Equality Commission was given leave to appear as *Amicus Curiae* (friend of the court) in the appeal. In their submission they argued that parental care for a disabled child does not 'materially change' when that child is hospitalised.

Decision of the Supreme Court:

O'Malley J held that the Court could not make a finding of invalidity on the basis of obvious irrationality, or illegitimate discrimination, merely by considering the terms of the statute. She held that it was necessary for the appellants to (i) adduce some evidence of the impact of the exclusion on the group of which they were members; (ii) demonstrate that Mr. Donnelly was not an unusual case; and (iii) demonstrate that the group of parents who were eligible (i.e. those who cared for their children at home) was not likely to have greater needs than the group of parents caring for children in hospital.

Furthermore, it was held that the claim under the ECHR also failed. She held that, in principle, the measure in question is one that comes within the category of social and financial legislation, and the ground for the exclusion is not a suspect ground. She held that it does not, therefore, attract an intense level of review per se and the burden on a challenger is accordingly heavier.

O'Malley J concluded that the appellants had failed to discharge the burden of proving that the measure in question was either invalid having regard to the Constitution or incompatible with the Convention. She therefore dismissed the appeal.

Date of final Decision: 4th of July 2022

Observations:

From the judgement discussed above it is evident that a challenge to legislation based on the guarantee of equality can only succeed if the exclusion is grounded on a constitutionally illegitimate consideration that results in an irrational distinction where some people are treated as inferior for no justifiable reason.

For ***more information***, contact us at:

Community Law and Mediation Centre, Northside
Northside Civic Centre, Bunratty Road, Coolock, Dublin 17
E:info@communitylawandmediation.ie | W: www.communitylawandmediation.ie
T: 01 847 7804